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Andrew Heng & Anor v Chong Kok Wooi (acting in his own capacity and representing the group of condominium unit owners of Marinox Sky Villas)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02-(NCvC)(A)-431-03 OF 2024
SUPANG LIAN, AZHAHARI RAMLI AND ISMAIL BRAHIM JJCA
C 26 JUNE 2025

Companies and Corporations — Winding up — Liquidator — Appointed by court — Respondent applied by way of originating summons challenging first defendant's decision pertaining to liquidator's fee — Whether leave of court was required before respondent could file originating summons against appellants — Companies Act 2016 ss 486 & 517

D

This was an appeal by the first appellant ('first defendant') who was the liquidator of the second appellant company ('second defendant') against the decision of the learned High Court judge ('HCJ') in allowing the respondent's ('plaintiff') application made by way of an originating summons ('OS') challenging the first defendant's decision pertaining to the liquidator's fee. The plaintiff filed the OS on his behalf as well as on behalf of other purchasers of a project ('the project') in Penang. The second defendant was the developer of the project. The plaintiff entered into a sale and purchase agreement to purchase one unit of apartment of the project from the second defendant. The second defendant was wound up and the first defendant was appointed as the liquidator of the second defendant. At the time of the winding up order, the individual strata titles of the project were yet to be issued by the relevant land office. Four months after the first defendant's appointment as the liquidator, the individual strata titles of the project were issued by the land office. The first defendant notified the plaintiff and other purchasers of the project that the liquidator's administrative fee for, among others, the execution of the memorandum of transfer was fixed at a flat rate of RM8,000 for each purchaser. The first defendant stated that there were insufficient funds available in the second defendant and that the fee imposed was necessary for previous works and further works to be done. The plaintiff, together with other purchasers, took issue with the first defendant pertaining to the fee and filed the OS. In allowing the plaintiff's OS, the HCJ found that the administrative fee of RM8,000 for each unit was unfair and unreasonable. Hence, this appeal. The defendants submitted that leave of court was a mandatory requirement for an action or proceedings against a company that had been wound up and also against a liquidator.

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Held, allowing the appeal:

(1) As a court appointed liquidator, the first defendant was an officer of the court, hence leave of court was required before any action or proceeding was taken against him. The operative words of s 486(2) of the Companies Act 2016 ('the CA') were 'subject to the control of the court'. It was imperative that the court should ensure that a liquidator would always act within the ambit of the law. Similarly, any action against the liquidator, as an officer of the court, must always be taken subject to the provision of the law. In *N Chanthiran a/l Nagappan v Kao Che Jen* [2023] 5 MLJ 284, the court interpreted the words 'subject to the control of the court' as an equivalent of the requirement of the leave of court to commence proceedings against a liquidator. The same leave requirement must be also extended to the proceeding under s 517 of the CA because, not only that the section was listed in Division 2 of Part IV, it was also a provision regulating an act of a liquidator, albeit by way of an appeal. It made no sense if any complain by the creditor or contributory against the exercise of the powers of the liquidator under s 486(2) of the CA was subject to the leave requirement (for reason to eliminate or to prevent any proceedings or conduct which will wrongfully impede the winding up process), the same could not be said for any proceeding under s 517 of the CA. The absence of the words 'subject to the control of the court' in s 517 of the CA was irrelevant (see paras 27, 33, 37 & 39).

(2) The submission of the plaintiff that leave was only required if the proceedings was taken either by the creditor or contributory was devoid of merit. The need for leave before any proceedings may be commenced against a liquidator was to ensure that he could carry out his statutory duty without having to defend any unnecessary litigation that may hinder the winding up process of a company. In view of the onerous statutory duty of a liquidator, there should not be any preference to any class of person who wished to commence a proceeding against a liquidator. Leave was needed even if the proceeding was instituted by persons other than the creditor or contributory (see paras 40–41).

(3) The OS was filed by the plaintiff (not a company) with the intention of escaping liability in respect of a claim (pertaining to the administrative fee of RM8,000) which had not been brought by the company itself. Hence, following *CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd and other appeals* [2002] 2 MLJ 1, leave was needed before the plaintiff could commence the action against the second defendant (see para 49).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu pertama ('defendan pertama') yang merupakan pelikuidasi syarikat perayu kedua ('defendan kedua') terhadap keputusan

A hakim Mahkamah Tinggi yang bijaksana ('HMT') yang membenarkan permohonan responden ('plaintif') yang dibuat melalui saman pemula ('SP') mencabar keputusan defendan pertama berkaitan yuran pelikuidasi. Plaintif memfailkan SP bagi pihaknya sendiri dan juga bagi pihak pembeli-pembeli lain sebuah projek ('projek') di Pulau Pinang. Defendan kedua adalah pemaju B projek tersebut. Plaintif telah memasuki perjanjian jual beli untuk membeli satu unit pangsapuri projek tersebut daripada defendan kedua. Defendan kedua telah digulungkan dan defendan pertama dilantik sebagai pelikuidasi defendan kedua. Pada masa perintah penggulungan, hak milik strata individu projek tersebut masih belum dikeluarkan oleh pejabat tanah yang berkaitan. C Empat bulan selepas pelantikan defendan pertama sebagai pelikuidasi, hak milik strata individu projek tersebut telah dikeluarkan oleh pejabat tanah. Defendan pertama telah memaklumkan plaintif dan pembeli-pembeli lain projek tersebut bahawa yuran pentadbiran pelikuidasi bagi, antara lain, D pelaksanaan memorandum pindah milik ditetapkan pada kadar rata RM8,000 bagi setiap pembeli. Defendan pertama menyatakan bahawa dana yang tidak mencukupi terdapat dalam defendan kedua dan yuran yang dikenakan adalah perlu untuk kerja-kerja sebelumnya dan kerja-kerja selanjutnya yang akan dilakukan. Plaintif, bersama dengan pembeli-pembeli lain, membantah E defendan pertama berkaitan yuran tersebut dan memfailkan SP. Dalam membenarkan SP plaintif, HMT mendapati bahawa yuran pentadbiran sebanyak RM8,000 bagi setiap unit adalah tidak adil dan tidak munasabah. Oleh itu, rayuan ini. Defendan-defendan berhujah bahawa kebenaran mahkamah adalah syarat mandatori bagi sesuatu tindakan atau prosiding F terhadap syarikat yang telah digulungkan dan juga terhadap pelikuidasi.

Diputuskan, membenarkan rayuan:

(1) Sebagai pelikuidasi yang dilantik mahkamah, defendan pertama adalah pegawai mahkamah, justeru kebenaran mahkamah diperlukan sebelum G sebarang tindakan atau prosiding diambil terhadapnya. Perkataan-perkataan yang beroperasi dalam s 486(2) Akta Syarikat 2016 ('AS') adalah 'tertakluk kepada kawalan mahkamah'. Adalah penting bahawa mahkamah untuk memastikan pelikuidasi sentiasa bertindak dalam lingkungan undang-undang. Begitu juga, sebarang tindakan H terhadap pelikuidasi, sebagai pegawai mahkamah, mestilah sentiasa diambil tertakluk kepada peruntukan undang-undang. Dalam kes *N Chanthiran a/l Nagappan v Kao Che Jen* [2023] 5 MLJ 284, mahkamah menafsirkan perkataan 'tertakluk kepada kawalan mahkamah' sebagai bersamaan dengan keperluan kebenaran mahkamah I untuk memulakan prosiding terhadap pelikuidasi. Keperluan kebenaran yang sama ini juga mesti diperluaskan kepada prosiding di bawah s 517 AS kerana, bukan sahaja seksyen tersebut disenaraikan dalam Penggal 2 Bahagian IV, ia juga merupakan peruntukan yang mengawal tindakan pelikuidasi, walaupun melalui rayuan. Tidak masuk akal jika sebarang

aduan oleh pemiutang atau penyumbang terhadap pelaksanaan kuasa pelikuidasi di bawah s 486(2) AS tertakluk kepada keperluan kebenaran (atas sebab untuk menghapuskan atau mencegah sebarang prosiding atau kelakuan yang akan menghalang proses penggulungan secara tidak wajar), perkara yang sama tidak boleh dikatakan untuk sebarang prosiding di bawah s 517 AS. Ketiadaan perkataan 'tertakluk kepada kawalan mahkamah' dalam s 517 AS adalah tidak relevan (lihat perenggan 27, 33, 37 & 39).

(2) Hujah plaintif bahawa kebenaran hanya diperlukan jika prosiding diambil sama ada oleh pemiutang atau penyumbang adalah tidak bermerit. Keperluan kebenaran sebelum sebarang prosiding boleh dimulakan terhadap pelikuidasi adalah untuk memastikan beliau dapat melaksanakan tugas statutori tanpa perlu mempertahankan sebarang litigasi yang tidak perlu yang mungkin menghalang proses penggulungan syarikat. Memandangkan tugas statutori pelikuidasi yang berat, tidak seharusnya ada keutamaan kepada mana-mana golongan orang yang ingin memulakan prosiding terhadap pelikuidasi. Kebenaran diperlukan walaupun prosiding dimulakan oleh orang selain daripada pemiutang atau penyumbang (lihat perenggan 40–41).

(3) SP telah difailkan oleh plaintif (bukan syarikat) dengan niat untuk melepaskan diri daripada liabiliti berhubung suatu tuntutan (berkaitan yuran pentadbiran RM8,000) yang tidak dimulakan oleh syarikat itu sendiri. Oleh itu, mengikut *CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd and other appeals* [2002] 2 MLJ 1, kebenaran diperlukan sebelum plaintif boleh memulakan tindakan terhadap defendan kedua (lihat perenggan 49).]

Cases referred to

CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd and other appeals [2002] 2 MLJ 1; [2002] 2 CLJ 1, FC (folld)

Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204, CA (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)

Humber & Co v John Griffiths Cycle Co (1901) 85 LT 141, HL (refd)

N Chanthiran a/l Nagappan v Kao Che Jen [2023] 5 MLJ 284; [2023] 5 MLRA 247, FC (folld)

Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713, FC (refd)

PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60, FC (refd)

Rahmat Ali Fatehullah v Calcutta National Bank Ltd AIR 1955 All 169, HC (refd)

Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd and others (1996) 14 ACLC 846, FC (refd)

Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation))

v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd) [2020] 6 MLJ 168, FC (refd)
TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow [1996] 4 MLJ 567, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 236(3)
Companies (Winding-Up) Rules 1972 r 63
Companies Act 2016 ss 417(1), 471(1), (2), 486, 486(2), (3), 487(4), 517, Part IV, Division 1, D2
Housing Development (Control and Licensing) Act 1966

Teh Tse Yee (with Cindy Wong Xin Tian and Lim Jin Wen) (TY Teh & Partners) for the appellant.
Khaw Yit Hao (BC Teh & Yeoh) for the respondent.

Azhahari Ramli JCA:

INTRODUCTION

[1] This is an appeal by Mr Andrew Heng (the first appellant/first defendant in the High Court) who is the liquidator of Masmeyer Development Sdn Bhd, (the second appellant/second defendant in the court below) against the decision of the learned High Court judge ('HCJ') dated 7 November 2023 in allowing the respondent's (the plaintiff in the court below) application made by way of an originating summons dated 30 March 2023 ('the OS'), challenging the first defendant's/first appellant's decision pertaining to the liquidator's fee. The respondent ie, Mr Chong Ko Wooi is also representing the unit owners of Marinox Sky Villas Condominium in Pulau Pinang.

[2] In this judgment, the parties will be referred to as they were in the High Court.

BACKGROUND FACTS

[3] The plaintiff filed the OS on his behalf as well as on behalf of 33 purchasers of a project known as Marinox Sky Villa ('the said project') in Penang.

[4] The second defendant ('the company') was a developer of the said project.

[5] The plaintiff entered into a sale and purchase agreement dated 2 December 2013 to purchase one unit of apartment of the said project from the second defendant for the purchase price of RM1,095,000.

[6] The second defendant was wound up by the Pulau Pinang High Court on 18 July 2019 and the first defendant was appointed as the liquidator of the second defendant on 30 January 2020.

[7] At the time of the winding up order, the individual strata titles of the said project are yet to be issued by the relevant land office.

[8] On 21 July 2020, four months after the first defendant's appointment as the liquidator, the individual strata title of the said project were issued by the Land Office.

[9] The first defendant, vide a letter dated 4 August 2020, notified the plaintiff and other purchasers of the said project that the liquidator's administrative fee for, among others, the execution of the memorandum of transfer is fixed at a flat rate of RM8,000 for each purchaser. The first defendant stated that there were insufficient funds available in the second defendant and that the fee imposed is necessary for previous works and further works to be done.

[10] The plaintiff together with 32 other purchases take issue with the first defendant pertaining to the said fee and filed the OS.

DECISION OF THE HIGH COURT

[11] In allowing the plaintiff's OS, the learned HCJ found that the administrative fee of RM8,000 for each unit is unfair and unreasonable for the following reasons:

(a) there is no equality of bargaining power between the plaintiff and the first defendant, in light of the administrative fee imposed by the first defendant being non-negotiable and determined at the first defendant's absolute discretion;

(b) the first defendant, as the liquidator of the company, is duty bound to carry out the duties and obligations of the company under the sale and purchase agreements and the Housing Development (Control and Licensing) Act 1966. In this instance, the issuance of the strata titles and the execution of the memorandum of title transfer to perfect the title to the unit owners;

(c) upon receipt of the full purchase price, the defendants become a bare trustee of the units in the housing project in favour of the plaintiff and other unit owners. The first defendant cannot use the strata titles in his possession as a ransom to demand for an unreasonable sum of RM8,000 per unit. The first defendant also has no right to impose a condition on

A the unit owners to pay a separate fee to his nominated solicitors, Messrs T Tharuma & Associates; and

(d) the first defendant's affidavits are bereft of any evidence to show the actual work done, and to prove the costs and expenses incurred by the B first defendant, to justify the requested sum of RM8,000 per unit. The first defendant will be enriched to the tune of approximately RM2.4m, if all 301-unit owners of the housing project made the payment to him blindly. The learned HCJ opined that from the facts of the case, the sum of RM1,000 is a fair and reasonable amount of the administrative fee.

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[12] The learned HCJ also held that, notwithstanding the fact that the first defendant was appointed as a liquidator to manage the assets of the second defendant, the leave of the court is not required for the plaintiff to proceed against the first defendant. According to the learned HCJ the case of D *N Chanthiran a/l Nagappan v Kao Che Jen* [2023] 5 MLJ 284; [2023] 5 MLRA 247 is distinguishable and not applicable to this case on the following grounds:

(a) in *N Chanthiran*, the plaintiff was a contributory who claimed that the liquidator had failed to perform his duties, thereby seeking his removal. E Whereas in the present case, the plaintiff and the other unit owners are not creditors or contributories. They are persons aggrieved by the decision of the first defendant in fixing the amount of RM8,000 per unit as his remuneration for the perfection of the strata titles;

F (b) in *N Chanthiran*, the issue was whether leave of court is required to proceed in an action to remove a liquidator. Whereas the present OS is an appeal against the first defendant's decision regarding remuneration, where no removal of the liquidator is sought for; and

(c) the plaintiff and the other unit owners are merely seeking for declaratory G orders to adjust the quantum of the administrative fees imposed. This does not disrupt the first defendant's task, as liquidator, of administering the assets of the wound up company. Whether the court reduces the first defendant's remuneration or not, will not affect the task of administration of the company. This is not a case where the plaintiff is H saying that the first defendant is not entitled to any remuneration at all. Instead the plaintiff is saying that the first defendant is entitled to an amount that is fairer and more reasonable.

[13] The learned HCJ also took into consideration public policy I consideration and took judicial notice that owners of properties in projects built by errant developers who go into liquidation before the strata titles are issued, have been at the mercy of private liquidator. According to the learned HCJ, the National House Buyer Association has been vocal on this matter, calling for the government to intervene to protect the owners from liquidators

who arbitrarily imposed fees for perfection of the transfer of strata titles. The learned HCJ also considered the instruction by the then Minister of Economy which caps the fee charged to home buyers at RM500 for undertaking the 'last mile', ie perfecting the transfer of the strata titles to the unit owners.

SUMMARY OF THE DEFENDANTS' SUBMISSION

[14] The defendants' main argument in this appeal is on the requirement of leave of court in an action against the company. Relying on s 417(1) of the Companies Act 2016 ('the CA'), the defendants submit that leave of court is a mandatory requirement for an action or proceedings against a company that has been wound up. The defendants further submit that the word 'court' in s 417(1) refers to a 'winding up court'.

[15] Similarly, the defendants also submit that leave of court is also required in an action or a proceeding against a liquidator. It was impressed upon us that the Federal Court case of *N Chanthiran* is applicable to this appeal and the learned HCJ had erred in distinguishing that case to our present appeal.

[16] With regard to the administrative fees imposed by the first defendant, it was submitted that the sum of RM8,000 was fair and reasonable. According to the first defendant, s 487(4) of the CA gives him a discretion in the management of the affairs and property of the company and the distribution of its assets which includes imposing the said fees.

[17] The defendants also submit that the learned HCJ had erred by agreeing with the plaintiff that the second defendant has cash at the bank in the sum of RM581,054.14 at the date of the commencement of the winding up proceeding and has assets in the amount of RM233,827.88 as at 30 July 2022. With regard to the sum of RM581,054.14, the defendants contend that the said amount was held in the housing development account and cannot be accessed except in accordance with the Housing Development (Control and Licensing) Act 1966. As for the RM233,827.88, the defendants submit that the plaintiff was misleading the court by alleging that the said sum being the 'receipt' as at 30 July 2020 because the actual amount was RM20,617.86 after deducting all payments made by the first defendant including for the deposits for action/proceedings taken by the second defendant against its former directors.

SUMMARY OF SUBMISSION BY THE PLAINTIFF

[18] In opposing this appeal, the plaintiffs submit that there is no appealable error in the decision of the learned HCJ warranting appellate intervention. The plaintiff maintains that the learned HCJ was correct in finding that the first

A defendant's administrative fee/remuneration in the sun of RM8,000 for each unit is unfair and unreasonable. The plaintiff's OS is brought pursuant to s 517 of the CA which require them to bring themselves within the definition of 'aggrieved persons'. In this respect, the plaintiff and other unit owners are undoubtedly 'aggrieved persons' because they have been forced by the first B defendant to pay fees of RM8,000 per unit under the disguise of administrative fees/remuneration for perfection of the unit owner's strata title. In this regard, the plaintiff submits that the first defendant cannot treat any discretion vested and conferred upon him under s 487(4) of the CA as giving him a carte blanche to act according to his whims.

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[19] It is submitted for the plaintiff that, being the liquidator for the second defendant, the first defendant would be the only person vested with the power and authority to execute the memorandum of transfer ('the MOT') in order to D perfect the transfer of strata titles to all unit owners. In the circumstances, there exists a significant imbalance of power between the plaintiff and the first defendant as the first defendant is in the driver's seat to dictate and abuse the discretion conferred upon him.

E **[20]** The plaintiff further submits that the first defendant, being the liquidator of the second defendant, now steps into the shoes of the second defendant and is duty bound to complete the defunct developer's duties and obligation under the sale and purchase agreement ('the SPA') and under the Housing Developers Act to ensure that the strata titles once issued are duly F registered in the names of the purchasers.

[21] The plaintiff also contends that since the plaintiff and the other unit owners have fully paid the purchase price of the units to the second defendant, the first defendant, being the liquidator of the second defendant, become a bare G trustee of the units of the project pending the issuance of the strata titles. Hence, the first defendant has a continuing obligation to ensure that the strata titles once issued are duly registered in the name of the unit owners without imposing unnecessary burden on faultless unit owners. It was suggested that by imposing a remuneration of RM8,000 per unit, the first defendant not only H holds the plaintiff and other unit holders to ransom but also seeks to make ridiculous profit from it. It is also highlighted that the first defendant had ridiculously imposed a condition on the unit owners to appoint the first defendant's nominated solicitors, Messrs T Tharuma & Associates for the preparation of the MOT and to pay a separate vetting fess. The plaintiff argued I that this vetting fee is essentially for the same work done by the first defendant which is also to conduct a verification exercise to identify the beneficial owner of the units and match the strata titles issued to each unit.

[22] Finally, the plaintiff submits that the first defendant has failed to

discharge his burden to substantiate his remuneration. According to the plaintiff, the first defendant had not shown a proper breakdown and/or specification of the works done by him. Further, the strata titles of the said project were issued by the Penang Land Office just within four months after the first defendant's appointment as liquidator without considering the time taken by the land office to finally issued the strata title. Hence, it was suggested that the first defendant had completed its work less than four months from the date of his appointment. Therefore, not much effort or work had been to be expended by the first defendant in obtaining the titles.

ANALYSIS AND FINDING

[23] The memorandum of appeal filed by the appellant listed 15 grounds of appeal against the decision of the learned HCJ. After perusing the appeal record, we are of the view that the main focus of this appeal is on the following main issues:

(a) whether the leave of the court is required before the plaintiff could file the OS against the first and second defendants; and

(b) if the answer to issue (a) above is in the negative, whether the first defendant has acted within the powers conferred by the CA when he imposed the impugned administrative fees.

[24] It is trite law that upon the granting of a winding up order, the company's business operation will cease to exist and all affairs of the company will be governed by a liquidator. In turn, a winding up is the process of liquidating assets of the company, paying its debts and subsequently to distribute the remaining assets or moneys to the shareholders and finally to dissolve the company. During this process, a liquidator will be appointed and the powers of the board of directors and the management of the company will be taken over by the liquidator. On the duty and responsibility of a liquidator, in *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567 the court opines:

> His task is thus onerous one. He is charged with a number of statutory duties .... He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might level against him. He ought to be protected against such abuse unless there is sufficient prima facie evidence to support such allegation. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegation he be given leave to bring an action against a liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumstances come to a halt. No one will venture towards this task. A liquidator will spend all his time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed.

[25] This brings us to the first issue to be determined in this appeal ie whether the leave of the court is required before the plaintiff could file the OS against the first defendant. The defendants relied on the case of *N Chanthiran* and submit that leave is required before an action can be filed against a liquidator of a wound-up company. Since the leave of court was not obtained before the OS was filed, the plaintiff's OS is incompetent and should be disallowed. On the contrary, the plaintiff submits that, since he is neither a creditor nor a contributory of the second defendant, leave is not required. For the same reason, the plaintiff contends that the case of *N Chanthiran* is distinguishable and not applicable in appeal.

[26] The powers of the liquidator in a winding up by the court order is provided for by s 486 of the CA which provides:

> 486(1) Where a company is being wound up by the Court, the liquidator may —
>
> (a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and
>
> (b) with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule
>
> (2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[27] In the present case, it is not disputed that the first defendant was appointed, vide the order of the court dated 30 January 2020, as the liquidator of the second defendant in substitution of the official receiver. As a court appointed liquidator, the first defendant is an officer of the court, hence leave of court is required before any action or proceeding is taken against him. This principle of law is propounded in the Court of Appeal case of *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 which states:

> At our resumed hearing, we struck off this appeal as we agreed with the learned judge that the motion, as such, in the first place, required the leave of the court before it could be brought but not for the reason found by the judge. Firstly, we read the powers of liquidator in s 236(3) of the Companies Act 1965 ('the Act'):
>
> > The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of those powers.
>
> We are of the view from the above provision, it is clear that the liquidator having been appointed by the court, is an officer of the court. It goes without saying leave of the court is needed before an action is commenced against him and officers like him.

[28] It must be noted that the said principle is also provided for under r 63 of the Companies (Winding-Up) Rules 1972 ie:

> 63 Officers of Court
>
> All liquidators appointed by the Court shall be officers of the Court.

[29] The rationale in requiring leave to be obtained in a proceeding against a liquidator is explained in the case of *Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd and others* (1996) 14 ACLC 846 where the Australian Federal Court held:

> ... the court must protect the integrity of the winding up under its supervision and control, by taking appropriate steps to prevent any proceedings or conduct which will wrongfully impede that process. One way in which this can be carried out is to require the grant of leave by the court in respect of any action against an official liquidator, so that the court can satisfy itself that there is no wrongful interference with the process.

[30] This principle has been endorsed in *N Chanthiran*. Delivering the judgment of the court Nallini Pathmanathan FCJ states:

> [52] The winding up court maintains control and supervision over liquidator to ensure that the winding up process is carried out in an orderly manner. This function of the winding up court is enshrined in s 236(3) of the 1965 Act, which stipulates as follows:
>
> > 236 Powers of liquidator
> >
> > ...
> >
> > (3) The exercise by the liquidator of the powers conferred by this section shall be *subject to the control of the Court*, and any creditor or contributory may apply to the court with respect to any exercise of any of those powers. (Emphasis added.)
>
> [53] The phrase 'subject to the control of the court' in s 236(3) of the 1965 Act (s 486(2) of the CA 2016) essentially means that a liquidator is answerable to the court in the performance of his duties. He is obligated to conduct the winding up process pursuant to the order granted by the winding up court. Once the liquidator is sanctioned to perform his duties by virtue of his appointment by the winding up court, no party can interfere with him save with the permission of the winding up court. It would amount to an abuse of process if proceedings can be commenced against the liquidator before different court notwithstanding the supervision exercised by the winding up court over the liquidator and the winding up process as a whole.
>
> [54] Leave of court refers to sanction and permission of the court. In seeking leave of court, a prospective litigant informs the court regarding a proposed step to be taken in a proceeding. Since a liquidator is subject to the control of the court as provided by ss 236(3) and 277(2) of the 1965 Act, the court should be advised in the event any action, including an application to remove the liquidator, is proposed to be initiated against the liquidator. In other words, the phrase 'subject to the

control of the court' is s 236(3) of the 1965 Act is equivalent to a requirement of leave of court to commence proceedings against the liquidator. This interpretation of s 236(3) of the 1996 Act is in line with the common law position adopted in other jurisdictions. Similarly, s 277(2) of the 1965 Act, by requiring the court to enquire into any alleged misconduct by the liquidator, effectively imposes a requirement for leave of court to be obtained prior to any action being taken against the liquidator.

[55] Furthermore, as set out earlier, a liquidator has the status of an officer of the court pursuant to r 63 of the Winding-Up Rules. It follows that the winding up court, having appointed the liquidator, has the sole authority to supervise, discipline and, if necessary, remove its officer. As such, leave of the winding up court should be obtained before commencing any proceedings against the liquidator.

[31] It is the plaintiff's submission that the court is not bound by *N Chanthiran* as the facts is distinguishable. According to the learned counsel, the applicant in *N Chanthiran* was the contributory of the wound up company and there he was applying to remove the liquidator from further acting as such. Whereas in our present case, the plaintiff is one of the purchasers of the units in the said project, challenging the imposition of the administrative fee of RM8,000 for perfecting the execution of the MO. Since the plaintiff is neither the creditor nor the contributory of the second defendant, learned counsel impressed upon us that *N Chanthiran* should not be applicable.

[32] This OS is filed pursuant to s 517 of the CA which provides:

517 Appeal against decision of liquidator

Any person aggrieved by any act or decision of the liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

[33] It must be emphasised that s 486(2) of the CA falls under subdivision 8 (relating to 'Provisions relating to Liquidators in Winding Up by Court') and Division 1 (relating to 'Voluntary and Compulsory Winding Up') of Part IV (relating to 'Cessation of Companies') of the CA . Whereas the shoulder note for s 486 of the CA states 'Powers of Liquidators in winding up by Court'. It is obvious that, being the officer of the court, the provisions under subdivision 8 govern the appointment (and removal), remuneration, control, powers and duties of a liquidator. In the context of these provisions we are of the view that the operative words of s 486(3) are 'subject to the control of the Court'. It is imperative that the court should ensure that a liquidator will always act within the ambit of the law. Similarly, any action against the liquidator, as an officer of the court, must always be taken subject to the provision of the law. Hence, in *N Chanthiran*, the court interpreted the words 'subject to the control of the court' as an equivalent of the requirement of the leave of court to commence proceedings against a liquidator.

[34] Be that as it may, the plaintiff insists that the case of *N Chanthiran* is not binding on this court and leave of court is not required based on the following reasons:

(a) the proceedings against the second defendant is not intended to fasten any liability on the company (*CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd and other appeals* [2002] 2 MLJ 1; [2002] 2 CLJ 1). Further the second defendant is a mere nominal defendant and there is no relief granted against the second defendant. Hence no leave is required for the proceedings against the second defendant;

(b) in the case of *N Chanthiran*, the action against the liquidator was taken by the contributory of the wound up company;

(c) in the present case the plaintiff is relying on s 517 of the CA and the case of *N Chanthiran* did not discuss the issue of whether leave is required in a proceeding taken under s 517;

(d) the words 'subject to the control of the Court' in s 236(3) do not appear in s 517, suggesting that the need of leave attached to that words is not a requirement in s 517; and

(e) the ratio decidendi in case of *N Chanthiran* is not binding on this court as it was decided per incuriam.

[35] On the subject of ratio decidendi, it must be noted that in the case of *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60, Tengku Maimun Tuan Mat CJ opines at para [16] that:

> [16] Without getting into a lengthy exposition of the concept, we find it necessary to state that 'ratio decidendi' is a legal term of very elementary status. Ratio decidendi is different from the decision of the court in that it comprises *the legal reasoning which forms the basis of the decision and it is this legal reasoning which ultimately finds its place in the doctrine of stare decisis*. (Emphasis added.)

[36] In this respect it is pertinent to identity what were the questions of law before the Federal Court in *N Chanthiran*. At para [10] of the judgment, the court states the questions of law as follows:

(1) whether the prior leave of the winding up court is required in order for legal proceedings to be commenced against a court appointed liquidator in respect of matters transacted by the liquidator under Divisions 1 and 2 of Part IV of the Companies Act 2016; and

(2) if the answer to question (1) is in the negative, whether such proceedings are to be brought in the winding up court and/or within the winding up proceedings if, among others, an order against the liquidator in his official capacity is sought.

[37] Section 517 of the CA is placed under Division 2 of Part IV of the CA, hence, even if the main focus of the Federal Court in that case was on the leave requirement under s 236(3) of the 1965 Act (s 486(2) of the CA 2016), the same leave requirement must be also extended to the proceeding under s 517 of the CA because, not only that the section is listed in Division 2 of Part IV, it is also a provision regulating an act of a liquidator, albeit by way of an appeal. It makes no sense if any complain by the creditor or contributory against the exercise of the powers of the liquidator under s 486(2) of the CA is subject to the leave requirement (for reason to eliminate or to prevent any proceedings or conduct which will wrongfully impede the winding up process), the same cannot be said for any proceeding under s 517 of the CA.

[38] It is also submitted on behalf of the plaintiff that the absence of the words 'subject to the control of the Court' in s 517 of the CA, as opposed to s 486(2), suggest that the requirement of leave (as decided in *N Chanthiran*) should not be imported into that section. We are of the view that that proposition should be considered in the light of para [65] of *N Chanthiran* as follows:

> [65] As stated earlier, the Court of Appeal in the instant appeal relied on *Kao Che Jen* in arriving at its finding that there is no requirement pursuant to s 486(2) of the 2016 Act (which is in *pari materia* with s 236(3) of the 1965 Act) for leave to be obtained before an action can be brought against a liquidator. Section 486(2) of the 2016 Act is reproduced below for convenience:
>
> > 486 Powers of liquidator in winding up by Court
> >
> > (2) the exercise by the liquidator in a winding up by the Court of the powers conferred by this section is *subject to the control of the Court* and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. (Emphasis added.)
>
> [66] Put simply, the Court of Appeal in the instant appeal held that the absence of the phrase 'leave of the court' from s 486(2) of the 2016 Act means that leave is not necessary to proceed against a liquidator. This is, for the reasons that have been enunciated at length above, a purely grammatical reading of the words in s 486(2) of the 2016 Act. As explained earlier, the requirement for leave of the winding up court to be obtained before proceedings can be commenced against a liquidator is in fact contained within s 486(2) of the 2016 Act in the form of the phrase 'subject to the control of the Court'. The Court of Appeal in the instant appeal, however, accorded an over simplistic interpretation to s 486(2) of the 2016 Act and failed to consider the provision in the context of Part IV of the 2016 Act and the Winding Up Rules. In the circumstances, it is our view that the decision of the Court of Appeal in the instant appeal is flawed as it adopted reasoning in toto of *Kao Che Jen*.

[39] As we have mentioned earlier, the requirement of leave in *N Chanthiran* was decided in the context of Part IV of the CA. Since s 517 of the CA is also placed in Part IV, we are of the view that the absence of the words 'subject to the

control of the Court' in s 517 of the CA is irrelevant in our present appeal.

[40] Further, we are also of the view that the submission of learned counsel for the plaintiff that leave is only required if the proceedings is taken either by the creditor or contributory is devoid of merit. The need for leave before any proceedings may be commenced against a liquidator is to ensure that he could carry out his statutory duty without having to defend any unnecessary litigation that may hinder the winding up process of a company. In view of the onerous statutory duty of a liquidator, there should not be any preference to any class of person who wishes to commence a proceeding against a liquidator. The same issue was discussed in *N Chanthiran* and it was held as follows as follows:

> [59] Interestingly, the Court of Appeal in *Kao Che Jen* referred to the Supreme Court decisions in *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233; [1992] 1 MLRA 71 and *Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors* [1995] 1 MLJ 1; [1994] 1 MLRA 412, which held that since the receivers are appointed by the court and are thus officers of the court, leave of the court should be obtained to proceed against them. The Court of Appeal also referred to its previous decision in *Woodsville* and acknowledged the principle established therein that leave of the court is necessary to sue a liquidator by virtue of him being an officer of the court.
>
> [60] Nonetheless, the Court of Appeal in *Kao Che Jen* distinguished the above cases on the grounds that each of those cases concerned proceeding brought against the liquidator or receiver personally for certain acts or in connection with the performance of their duties and accordingly did not involve any legislative provision equivalent to ss 232(1) or 266 of the 1965 Act. The Court of Appeal emphasised that the action before it is governed by ss 232(1) and 266 of the Act, neither of which specified leave as a prerequisite to an application for the removal of a liquidator.
>
> [61] *The above is, with respect, an artificial distinction devoid of merits. There is, in substance, nothing that differentiates an application to remove a liquidator from an action commenced in respect of the performance of his duties. Both are proceedings which will interfere with the functions of an officer of court. The rationale behind imposing a requirement for leave before any proceedings can be brought against a liquidator is to protect him from spurious or vexatious litigation and to provide an unwarranted and wrongful interference with the winding up process*. These reasons apply equally in the context of an action to remove a liquidator, where a requirement to seek prior leave of the winding up court will protect the liquidator from having to defend himself against potentially frivolous applications for his removal, which in turn will allow him to focus on the task of administering the affairs of the wound up company for the ultimate benefit of the unsecured creditors. (Emphasis added.)

[41] We find no reason to disagree and to depart from the decision of *N Chanthiran*. Not only are we bound by the doctrine of stare decisis, the said decision is also consistent with the position taken by a long list of authorities in

our jurisdiction, including the Federal Court case of *Tee Siew Kai (liquidators for Merger Acceptance Sdn Bhd (in liquidation)) v Machang Indah Development Sdn Bhd (in liquidation) (previously known as Rakyat Corp Sdn Bhd)* [2020] 6 MLJ 168 and *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713, that leave of the court is needed before proceedings against a liquidator can be commenced. In the context of this appeal, leave is needed even if the proceeding is instituted by persons other than the creditor or contributory.

[42] For this reason, we are of the view that the learned HCJ has erred in deciding that he is not bound by the case of *N Chanthiran*. The High Court is bound by the doctrine of stare decisis to follow the pronouncement of the apex court warranting appellate interference by this court (see *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293). Be that as it may, learned counsel for the plaintiff expressed his concern that, if the leave of the court is required, the plaintiff and other unit owners, being the aggrieved persons, will never be able to satisfy the test on the point of pecuniary loss as decided in *N Chanthiran*. We are of the opinion that that issue is not relevant at this appeal because the issue should be raised at the leave application stage. The issue is only relevant if the exercise of the discretion of the court hearing the leave is the subject matter of this appeal.

[43] In the circumstances, we are of the considered view that the learned HCJ was plainly wrong in his finding which warrants appellate interference.

WHETHER LEAVE OF COURT IS REQUIRED AGAINST THE SECOND DEFENDANT

[44] It is well settled that an action or proceeding against a wound up company can only be commenced with the leave of the court. Section 471(1) and (2) of the CA provide:

> 471 Action or proceeding stayed after winding up order
>
> (1) When a winding up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded or commenced against the company except by leave of the Court and in accordance with such terms as the court may imposes.
>
> (2) The application for leave under subsection (1) shall be made to the court granting the winding up order and shall be served on the liquidator
>
> (3) ...

[45] Be that as it may, the plaintiff argues that leave is not required in this case because there is no relief prayed for against the second defendant or any liability sought to be fastened thereof. The plaintiff cited the case of *CGU*

Insurance Bhd v Asean Security Paper Mills Sdn Bhd and other appeals [2002] 2 MLJ 1; [2002] 2 CLJ 1 for the proposition that the words 'against the company' in s 471(1) must refer to proceeding where the liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of the proceedings commenced by the company itself.

[46] In response, learned counsel for the defendant submits that the OS instituted by the plaintiff against the second defendant for a declaration against the latter is certainly not 'commenced for the benefit of the company' but 'intended to fasten liability on the Company' and the second defendant is clearly sued not as a nominal defendant. Citing the same case of *CGU Insurance Bhd*, they maintain that the OS is not in the nature of a defensive action viz the company.

[47] It must be emphasised that *CGU Insurance Bhd* referred with approval the decision in *Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141 and *Rahmat Ali Fatehullah v Calcutta National Bank Ltd* AIR 1955 All 169. It was held that, in interpreting the words 'proceeded or commenced against the company' the case of *Humber* and *Rahmat Ali* had enunciated a defensive action approach that seems to strike a balance between the need to protect the interest of the company under liquidation on the one hand and render due justice to the defendant. *CGU Insurance Bhd* referred the following passages in *Rahmat Ali*:

> The words 'against the company' must mean a proceeding where the liability is intended to be fastened on the company or its assets and not a proceeding commenced by the company itself. It would be probably be useful to clarify the position a little further. If a person wants to file a suit to escape liability on the ground that the company's claim against him is unfounded, it is a proceedings commenced against the company, but where the company has started the proceeding, that is, put forward its claim in the court of law, any remedy available by way of defence to escape liability, which the company wants to fasten on him, should be deemed to be a proceeding commenced or continued against the company and in such a, the question whether the claim was put forward or the suit was filed by the company before or after the winding up order, should make no difference.
>
> In (1901) 85 LT 141 (J), Lord Davey said:
>
> > It was the respondents who themselves proceeded with the action after the winding up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with, there is no necessity for the defendants in that action to obtain leave for any defensive proceeding on their part case
>
> Braund J distinguished those observations and confined them to a case where the action had been taken by the company and proceeded with after the winding up

order. As Lord Davey was merely stating the facts of the case before him, he should not be understood to have meant that if the appeal had been filed and proceeded with by the company before the winding up order, his decision would have been the other way.

This appears to us to be also just and proper as in such a case, it is the company which wants to fasten the liability while the person against whom such liability is attempted to be fastened, in a legal proceeding pending in a court, wants to escape that liability. Liquidation process under the Company Act are for making available the assets of the company in *pari passu* satisfaction of its liabilities, and if persons other that the secured creditors are allowed to enforce their claims without any control exercised by the company judge, it may defeat or delay that object. But where a company has initiated a proceeding in a court of law whether before or after winding up order, no permission of the company judge should be needed for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him.

If, however, the proceeding in court of law are started by a person other than a company, either with the object of fastening a liability on the company or with the intention of escaping a liability in respect of a claim which has not been brought into court by the company itself, the permission of the company judge is required for the institution or the continuance of the proceedings. For instance, if a person files a suit for a declaration that the company owes to him a certain amount of money or that he does not owe the company any sum of money, the permission of the company judge is necessary. If, however, the company has instituted a suit or other proceeding to enforce a claim, any action taken by the defendant or the opposite party by way of defence, or if the company has obtained a decree or order, any defensive action by way of appeal, revision, review or setting aside of an exparte decree or order, should not require the permission of the company judge.

[48] While *CGU Insurance* had endorsed the defensive action approached taken by *Rahmat Ali* and *Humber*, it is also pertinent to note that the court had also examined and accepted the argument in the two cases before arriving at the decision. In this regard, *CGU Insurance* accepted the proposition that in determining whether leave is required before an action may be commenced against a wound up company, the court would have to consider the nature of the claim. There are two categories of claim that the court should examined namely:

(a) where a company has initiated a proceeding in a court of law whether before or after winding up order, *no leave of the winding up court should be needed* for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him; and

(b) if, however, the proceeding in court of law are *started by a person other than a company, either with the object of fastening a liability on the company or with the intention of escaping a liability in respect of a claim which has not been brought into court by the company itself, the leave of the winding up*

court is required for the institution or the continuance of the proceedings. (Emphasis added.)

[49] Applying the above test to our present case, it is obvious that the OS was filed by the plaintiff (not a company) with the intention of escaping liability in respect of a claim (pertaining to the administrative fee of RM8,000) which has not been brought by the company itself. Hence, following *CGU Insurance*, leave is needed before the plaintiff could commence the action against the second defendant. The learned HCJ did not refer to *CGU Insurance* in his judgment resulting in failure to appreciate and to apply correct principle of law to the facts of the case. Hence, we are of the considered view that the learned HCJ had committed a plain error which warrants appellate interference.

[50] Based on the aforesaid reasons, we are of the opinion that the learned HCJ had committed plain error of law in holding that no leave is required before commencing the OS proceedings against the defendants. On this issue alone, we allow the appeal by the first and second appellants (the defendants in the court below) and set aside the order of the High Court. Consequentially, the respondent's OS in the High Court is hereby dismissed.

[51] Costs of RM15,000 to the appellants subject to allocator.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh